

REPORTABLE (116)

TENDAI BONDE
v
FLYNOTE INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
BULAWAYO: 10 MAY & 12 DECEMBER 2024

Applicant in person

T. Ndebele, for the respondent

IN CHAMBERS

MAVANGIRA JA:

1. This is an application brought in terms of r 60 (2) of the Supreme Court Rules, 2018, as read with s 92F (3) of the Labour Act, [*Chapter 28:01*]. The applicant seeks an order in the following terms:

- “1. The application for leave to appeal be and is hereby granted.
2. The applicant shall file his notice of appeal within 5 days of the order.
3. Respondent to pay the costs.”

FACTUAL BACKGROUND

2. The applicant and the respondent were employee and employer, respectively. Their respective versions regarding the crucial facts of this matter, eventually culminating in the filing of this application, are divergent.
3. On the applicant’s part, his affidavit filed in support of this application gives a terse and overly abridged version of events. It is so abridged that it leaves out some essential details as well as the steps taken to get to some of the stages that he refers to. His affidavit thus

does not flow. To the extent that it has been possible to extract the same, the following is his version which, unavoidably, is afflicted by the deficiency of the affidavit from which it is so extracted.

4. A dispute arose between the applicant and the respondent over disparity of salaries. The Labour Court (the court *a quo*) directed the Labour Officer to inspect the respondent's pay roll. The applicant provided the Labour Officer with "a list of comparators" (whom he also later referred to as expatriate employees.) The Labour Officer did not comment on the figures on the pay roll but admitted the presence of the mentioned expatriate employees thereon. Unhappy with the Labour Officer's ruling, but finding himself out of time for the filing of an appeal, he applied for condonation. Presumably the application also included or incorporated an application for extension of time within which to note an appeal.
5. In his affidavit in *casu*, the applicant mentions that in the affidavit attached to his application for condonation, he stated that the expatriate employees earned unreasonably more than him. He also mentions that the respondent did not oppose the said application in which he made a serious allegation of different salaries. Condonation was granted. The subsequent appeal was dismissed by the court *a quo* whose stance was that the order to inspect the pay roll or wage book was all about checking the applicant's name on the payroll and had nothing to do with the wages of other employees. The applicant believes that the Supreme Court will come to a contrary conclusion and agree with him that the Labour Officer was seized with "the issue that the comparators were expatriate employees." Further, that "given the obvious fact that the expatriate employees are people of colour" the court *a quo* "did not deal with the alleged discrimination on likely grounds of race or place of origin." (*sic*) Such a mistake

means that the decision of the court *a quo* may be “upturned on the basis of the central issue of illegality in the contravention it did not consider.” (*sic*)

6. The applicant further states that as the court *a quo* is a court of equity, the issue before it for determination involved evaluating the findings of the Labour Officer and the matter could not be concluded without an assessment of what the expatriate employees earned. The court thus erred when it did not apply its mind to the question whether the expatriate employees earned the same as the applicant as it was furnished with the names of the other employees and their respective salaries.

7. Without having mentioned anything about a car scheme earlier, the applicant states in the last two paras of his affidavit as follows:
 - “20. Since there was a finding that there was no car scheme attached to the level of my salary the absence of such extraneous issues meant that there was every reason to compare the salaries. The particular finding of Labour Officer that I insisted on comparisons of salaries means it is inescapable that the dispute ends without resolution of the alleged discrimination against expatriate staff. (*sic*)

 21. I believe that a discretionary ruling can be upturned since there was a demonstrable error of law. I pray for an order in terms of the draft order.”

8. Before giving its version of events, the respondent raises a preliminary point to the effect that the grounds of appeal raised in the applicant’s intended notice of appeal do not raise questions of law but on the contrary, raise questions of fact, thereby disqualifying the application which falls foul of r 60 (2) of the Supreme Court Rules, 2018, (the Rules). It is contended that the question whether or not there were expatriate employees and that of the discrepancy between their salaries and that of the applicant was never before the court *a quo*. Consequently, there is no valid application before this Court.

9. In response to the applicant's averments, the respondent's version follows hereafter.
10. The dispute did not relate to the disparity of salaries but to the alleged underpayment of the applicant's salary. The Labour Officer was directed to inspect the salary wage book so as to ascertain if deductions were made for the purchasing of a vehicle for the applicant. "The issue of comparators" was not before the Labour Officer. The mere mention of names by the applicant did not mean that the so-called comparators had become an issue to be determined by the presiding Labour Officer. The applicant is only trying to smuggle in a new issue on appeal. As the issue of expatriate employees was not before the Labour Officer, he therefore had no mandate to deal with it. The fact that the applicant's application for condonation was not opposed did not give him an avenue to bring in new issues. He cannot therefore, claim to have introduced a new issue through an application for condonation. The court *a quo* was correct that the duty of the Labour Officer was to inspect the salary wage book for the purpose of establishing whether or not the applicant was underpaid, such allegation having been premised on the claim that there was an agreement that a vehicle was being purchased for him. The issue of the salaries of other employees was not before the officer.
11. As the applicant had not raised any point of law in his intended grounds of appeal, he has no prospects of success on appeal. He is grossly abusing court process and frustrating the respondent. The inspection was ordered at the request and instance of the applicant because he claimed to have been underpaid due to deductions that were being made for the purpose of purchasing a vehicle for him. The applicant is now avoiding that issue of his alleged underpayment opting to deliberately labour the court with issues that were not before the

court *a quo*. This is against the background of the court *a quo*'s findings that no such deductions were ever made and that if ever an agreement was entered into as alleged by the applicant, such was unlawful. The court *a quo* had no duty dealing, on appeal, with an issue that was never before the Labour Officer in the first place. It was an afterthought on the applicant's part, after the finding that no underpayment was ever done, to then raise the issue of expatriate employees. The issue of expatriates was never before the court *a quo* and still is not before this Court.

12. The respondent contends that there are no prospects of success on appeal as no point of law is raised. It prays for the dismissal of the application with costs.

THE COURT A QUO'S DETERMINATION ON THE QUESTION OF LEAVE TO APPEAL

13. The applicant's appeal before the court *a quo* having been dismissed on the basis that there was no misdirection on the part of the Labour Officer, the applicant applied for leave to appeal. In disposing of the application for leave to appeal the court *a quo* gave an order in the following terms:

"IT IS ORDERED THAT:

1. The grounds of appeal not raising any points of law and there being no prospects of success on appeal;
2. The application for leave to appeal to the Supreme Court be and is hereby dismissed.
3. Each party to bear its own costs."

JUDGMENT INTENDED TO BE APPEALED AGAINST

14. A fuller, if perhaps clearer, version of the facts of the dispute seems to be discernible from the judgment of the court *a quo* which the applicant wishes to appeal against, as read with the “Determination of Dispute of Right in terms of s 93 (7) (b) (ii) of the Labour Act” (*sic*) (the determination), dated 24 July 2023 by the Labour Officer, Milton Chidziya. The more detailed version is to the following effect:
15. The applicant is a former employee of the respondent. He was employed as a stock feed mixer from July 2021 until March 2022. It was alleged that he was found to be preparing stock feed for third parties without the knowledge of his employer. The verbal contract of employment (the applicant having refused to sign a written one) was terminated.
16. The applicant subsequently approached the Labour Officer. The Labour Officer made a draft ruling and filed an application for its confirmation before the Labour Court. This was before the coming into effect of the Labour Amendment Act No. 11 of 2023 which repealed s 93 (5) (C) in its entirety and substituted it with s 36 of the said Amendment Act, which inserted s 128 (Transitional Provision), that made the Labour Officer’s ruling binding on parties. The court *a quo*, per MOYA-MATSHANGA J, in a judgment handed down on 23 March 2023, pronounced as follows:

“That the confirmation of the draft ruling be and is hereby declined. The matter is hereby remitted for a hearing *de novo* by the same Labour Officer. The Labour Officer is hereby ordered to search the respondent’s premises in terms of s 126 of the Labour Act [*Chapter 28:01*]. (*sic*) For a salaries register or wage book for the period within which first respondent was employed to put to rest the issue of outstanding amount being part of the salary allegedly deducted for the purpose of a motor vehicle. Applicant is ordered to do so within a week of this order in order to bring finality to litigation.” (The underlining is mine)

17. The Labour Officer conducted an inspection of the salaries register or wage book on 11 April 2023, in the presence of the applicant for the period that the applicant was engaged as an employee. Thereafter two conciliation meetings were held on 26 April 2023 and 3 May 2023 but no agreement was reached, leading to the issuance of a certificate of no settlement on 3 May 2023.
18. Thereafter, the applicant filed a court application before the court *a quo* on 9 June 2023 objecting to the jurisdiction of the Labour Officer, Ms Patronella Kandengwa, on the basis that she did not conduct conciliation proceedings within the stipulated time frame and that she did not carry out investigations in terms of s 126 of the Labour Act. The matter was then allocated to Labour Officer Milton Chidziya. This was after the applicant had also filed an “application for determination of dispute of right in terms of s 93 (7) (b) (ii) of the Labour Act”, which application resulted in the court *a quo*, per MOYA-MATSHANGA J, giving the following order:

- “1. The application be and is hereby granted.
2. The matter be and is hereby remitted to be dealt with by a different Labour Officer to be assigned by the Senior Labour Officer to examine the salaries and wages book for the period that the applicant worked for the second respondent and to do so in the presence of all the interested parties.
3. The examination is to be done within seven (7) working days of this order.
4. Each party is to bear its own costs.”

It was by command of this order that the matter was allocated to Mr Chidziya.

19. The newly appointed Labour Officer, Mr Chidziya, in the presence of the applicant, inspected the wages book and a computer-generated salary schedule for both the management and all the employees. After the inspection, he made findings to the following

effect:- Firstly, that there was never a deduction for the purchase of a vehicle, both on the salary schedules produced and inspected and on the pay advice slips. The next finding was that the record reflected that the applicant had received the following salaries; ZWL \$26 904,00 for July, 2021; ZWL\$39 999,97 for August, 2021; ZWL\$40 000,21 for September, 2021; ZWL \$40 000,21 for October 2021; ZWL \$49 999,52 for November 2021; ZWL\$59 999,52 for December 2021; ZWL\$59 999,52 for January 2022 and ZWL\$0,49 for February, 2022. Nowhere did the figure of ZWL\$197 000, 00 appear in the books inspected; nor did any deduction meant for the purchase of the vehicle appear.

20. The Labour Officer made a ruling on 1 July, 2023. This was now after the promulgation of the Labour Amendment Act No. 11 of 2023 which repealed s 93 (5) (C) in its entirety and substituted it with s 36 of the said Amendment Act, which inserted s 128 (Transitional Provision), that effectively did away with the requirement for a Labour Officer to apply for confirmation of his or her draft ruling.
21. Aggrieved by the Labour Officer’s ruling, the applicant appealed to the court *a quo*, raising the following grounds of appeal:

“1. The Labour Officer misdirected himself at law when he failed to state the salaries of expatriate staff when such comparators were put before the Labour Officer for the determination by that office.

2. The Labour Officer misdirected himself at law when finding that a court cannot release parties from the meaningful effects of illegal contract.”

The relief that he sought is recorded in the judgment as:

“RELIEF SOUGHT

1. The appeal be allowed.

2. Judgment *a quo* be set aside and substituted with the following order:
 - (i) Respondent be and is hereby ordered to pay Tendai Bonde a salary of \$197 000 RTGS at the prevailing interbank rate of 86:92 as at July 2021.
 3. Respondent to rectify liability that accrued from July 2021 to March 2022.
 4. A prescribed rate of interest per annum to be applied.
 5. Respondent to pay costs.” (The underlining is mine)
22. According to the court *a quo*'s judgment, at the hearing before the court, whilst conceding that the Labour Officer went with him to inspect the books, the applicant contended that the Labour Officer sided with the employer and did not come up with any meaningful decision. He alleged that it was him, the applicant, who had made up the list of salaries received for the given months. The court *a quo* disbelieved him and believed the Labour Officer who categorically stated that he was given the wages book, salary schedule and pay advice slips from which he extracted the information that he recorded.
23. It is also stated in the judgment that the applicant was adamant that he earned ZWL \$197 000, 00 while the respondent's contrary stance was supported by the findings of the Labour Officer. The respondent also confirmed that an inspection was done and evidence clearly showed what the applicant earned.
24. In its judgment, the court *a quo* found that the grounds of appeal on the basis of which it was approached, raised issues which were never before the Labour Officer. The salaries of expatriates and comparators were never issues before the said officer. It stated that its earlier order clearly stated that the Labour Officer should inspect the salaries book to find out whether the appellant earned ZWL\$197 000, 00 and whether there was any deduction from

it meant for the purchasing of a motor vehicle. It found that the Labour Officer did as ordered and that there was no misdirection on his part. The court *a quo* further held that the issue of comparatives did not arise and therefore the applicant could not successfully raise it for the first time as a ground of appeal, when the Labour Officer did not have the opportunity or more crucially, the need to address it. Having found no misdirection on the part of the Labour Officer, the court *a quo* dismissed the appeal with costs.

25. Aggrieved, the applicant unsuccessfully applied for leave to appeal before the court *a quo*. On 4 April, 2024, the court *a quo* dismissed the application for leave to appeal on the basis that the intended grounds of appeal did not raise any points of law and that there were no prospects of success on appeal. Each party was ordered to bear its own costs. The applicant thereafter filed this application.

THIS APPLICATION

26. In this application, the applicant seeks an order granting him leave to appeal to the Supreme Court against the whole judgment of the court *a quo*. The draft notice of appeal attached to this application intends to raise before the Supreme Court, grounds of appeal which are quoted verbatim below:

- “1. Having directed the labour officer to inspect the salary wage book, the court *a quo* erred at law by not finding for or against appellant the disparate or lack of disparate between him and expatriate staff when such a question was placed before the Honourable Court for its determination.
2. The court *a quo* erred at law when it did not apply its mind on the question whether expatriate employees named in the ruling by the labor officer earned the same salaries as sought by the appellant.
3. The court *a quo* made a gross misdirection on the facts, amounting to misdirection in law. The court *a quo* sought to interpret the evidence in a manner inconsistent

with the record which had the effect of violating s 165 (2) of the Constitution of Zimbabwe.

4. The court *a quo* made a gross misdirection on the facts, amounting to a misdirection at law, overlooking evidence, not exercising its equitable discretion at all. Whether by value judgement or assessment, notwithstanding facts proffered which manifested good cause for the relief sought.”

The relief sought is an order in the following terms:

- “(a) The appeal is allowed with costs.
- (b) The judgment of the court *a quo* is set aside and substituted with the following order:
“The appeal be and is hereby allowed with costs”
- (c) The Registrar of the Labour Court is hereby ordered to set down the matter for determination of equity of salaries between the appellant and expatriate employees.”

27. The applicant filed heads of argument in which he submitted, amongst other things, without expounding how the principle applied to this case, that a gross misunderstanding of facts culminates in a point of law. He also submitted that “having directed the labour officer to inspect the salary/wage book, the court *a quo* erred at law by not finding for or against the appellant the disparate or lack of disparate between him and expatriate staff when such a question was placed before the honourable court for its determination” (*sic*) because a trier of fact must decide all issues brought for adjudication. He also submitted that the court *a quo* erred when it did not apply its mind to the question whether the expatriate employees named in the ruling by the Labour Officer “earned the same salaries as sought by appellant.”
28. He claimed that the allegation that expatriate staff earned more was not challenged “when the issue was brought on affidavit.” In his oral address to the court, he submitted that the respondent was wrong to say that the intended appeal is on factual issues and that there are

no points of law. He contended that the respondent is wrong because the court *a quo* failed to determine issues before it; there was an issue of disparity of salaries which was not resolved. He argued that the court *a quo* should not have ignored the issue. The court *a quo* being a court of equity ought to have determined the issue.

29. The applicant was adamant that the issue of the disparity in salaries between him and other employees was always before the Labour Officers. He referred to and quoted from the draft ruling by Miss Kandengwa. He also quoted an excerpt from Mr Chidziya's determination, which is attached to his application. He quoted the highlighted portion of the excerpt immediately below but omitting some words in the process. He omitted the words "through records" creating, in the process, a different understanding that a holistic reading of the excerpt gives. He made no reference to the parts that are not highlighted. He also created and added the word "was" between "individual" and "Waqas" as will be seen hereunder again creating a different meaning than what a proper reading does:

"During the inspection of the salary schedules the applicant reiterated that some employees were missing on the schedule and wanted to see how much these employees were being remunerated since they were on the same grade with him. After examination and asking of names it was revealed through records that one of the said individual (*sic*) (was – this is a word added by the applicant) **Waqas Aslam Muhammad is a Director and shareholder of Flynote Investments (Pvt) Ltd as clearly shown in ... *Before the inspection the applicant who was employed as a Nutritionist claimed Waqas Aslam Muhammad and other two expatriate staff are on a different salary schedule that the second respondent did not reveal.* It is therefore significant to note that there was evidence that employees of the second respondent were remunerated as shown on the salary schedules provided and there was no evidence to suggest that another salary schedule existed with better services for expatriate staff."**

30. The Labour Officer further stated:

"It is not in dispute that the applicant received salaries from the second respondent as according to the salary schedules and statutory deductions such as NSSA and PAYE were remitted to administration bodies on time as shown by the salary schedules.

Following an allegation by the applicant that salary schedules were not credible and reliable it can be noted that the inspection afforded the Labour officer chance to check the NSSA portal of the second respondent to see if NSSA dues were remitted on time as deducted on schedules and results showed that employee and employers including those of the applicant were remitted each month from July 2021 to February 2022. In the final analysis, having taken everything into consideration, I am not convinced that applicant has an unassailable case of underpayment and non-disclosure of pay advice slip against second respondent. The salary records do not speak language of underpayment and there is no probative evidence in support of the claim of underpayment. The pay advice slips have since been disclosed to the applicant. The alleged agreement to deduct part of the applicant's salary towards purchasing a vehicle is not reflected in any of the salaries and wage records or any written correspondence. In the event that the agreement is proven to have been made, it is against the requirements of law as stipulated in s 12A (6), (7) Labour Act [*Chapter 28:01*]” (the underlining is mine)

Notably, in the final analysis, the Labour Officer determined that the records examined showed no sign or proof of underpayment as claimed by the applicant. Furthermore, that the salaries schedules did not show deductions for a vehicle and also did not show the alleged salary payment of ZWL\$ 197 000, 00 from July 2021 to February 2022. There was thus no underpayment and no outstanding amount being part of the salary, deducted for the purchase of a motor vehicle. He concluded that “the claim of underpayment is dismissed for lack of evidence and it being an illegal claim.”

31. For the respondent, Mr *Ndebele*, submitted that the issue of alleged disparity of salaries that the applicant now wants to dwell on, was never before the court *a quo*. Further, that the applicant tried to use the Labour Court as a court of first instance when he raised the issue of the disparity of salaries before it. He highlighted that the issue that he brought before the Labour Court was his allegation that he had been underpaid, which the court *a quo* found to be not so. He further submitted that the applicant is raising questions of fact and not questions of law. He prayed for the dismissal of the application with costs.

32. In heads of argument filed on behalf of the respondent, the submission is made that the applicant introduced a new issue and that it cannot be adjudicated upon by this Court on the basis that an appellate court by its nature is designed to deal with issues that were brought for contention before the court *a quo*. Authorities are cited, including *ANZ Grindlay Bank (Zimbabwe) (Pvt) Ltd v Hungwe*, 1994 (2) ZLR 1 (S), to the effect that it would be highly irregular and unfair for an appellate court to assume the jurisdiction of a court of first instance and to pronounce on issues which are properly cognizable in a court of first instance but have not been canvassed before that court.
33. It is also contended in the heads of argument, that the issue of underpayment was conciliated. However, the underpayment which was alleged was not on the grounds of internal equity as now advanced by the applicant, but was founded on the allegation that the respondent had agreed to make deductions on his salary for the purposes of purchasing a vehicle for him. The mandate of the Labour Officer was thus to establish if there was any underpayment of the applicant's salary for the purchase of a vehicle; and this was conciliated on. It is submitted that the Labour Officer even went further to comment on the legality of making deductions from the salaries of employees and described situations under which such is permitted by law. The respondent further contends that in any event, this does not fall under or fit into the category of a point of law, but is rather a point of fact, with the result that there would be no valid appeal for the Supreme Court to determine.
34. The respondent further contends in relation to the applicant's claim of discrimination that the purpose of the inspection of the salary book was clear and a thorough inspection was

made; it would be contrary to the order of the Labour Court for the Labour Officer to look at other issues outside the premises of the order. The issue that was before the court *a quo* for confirmation was that of underpayment of salaries and whether or not the alleged salary of ZWL\$197 000, 00 ever existed. It was found to not exist. In *casu*, the applicant has not provided any evidence to prove his allegations. In fact, the Labour Officer did not ignore the issue of expatriate staff; the correct position is that it was never up for determination. The applicant's initial complaint was about deductions that were made for the purpose of purchasing a motor vehicle. Once it was concluded that there were no such deductions made, the applicant resorted to the accusation that there were expatriate employees who were employed by the respondent who earned more than him.

35. Commenting on the applicant's intended first ground of appeal, the respondent contends that it is absurd for the applicant to allege that the court *a quo* erred by not finding "a disparate" between him and the expatriate staff when such a question was not even the issue for determination. On the second ground, it contends, *inter alia*, that the ground is technically the same as the first ground of appeal. With regard to the third ground of appeal, it is submitted that it is absurd for the applicant to raise a contravention of a constitutional provision before this Court instead of taking the issue to the Constitutional Court.
36. In his reply, the applicant insisted that the issue of the disparity of salaries was an issue before the court *a quo* and which the said court ought to have made a determination on. He referred to the change to or amendment that was made of s 93 (5) (a) of the Labour Act and submitted that before the amendment came into being, the dispute regarding disparity of salaries was within the court *a quo*'s purview and it must resolve the dispute.

A. ANALYSIS

37. The applicant sought to convince the court that the issue of the disparity of salaries was a live issue when the court *a quo* gave the order whose compliance was assigned to Mr Chidziya. To the contrary, the Labour Officer's determination, which is discerned from the court *a quo*'s judgment, as stated in para 14 above, clearly gives a different version. He states on the second page of his determination as follows:

“Examination of the salaries and wage book Background

It is of paramount importance to note that the reason to inspect the second respondent's salaries and wages book as specified in the Court order was to put to rest the issue of outstanding amount being part of the salary allegedly deducted for the purpose of a motor vehicle. The applicant Tendai Bonde on 8 November 2022 filed a case at Ministry of Labour alleging underpayment and non-disclosure of pay slip. The applicant alleged that he was underpaid by the second respondent in that he was paid less than the agreed wage. According to the applicant it was submitted that instead of being paid the agreed salary of \$ 197 000 he was paid part of it during the entire working period (and the balance from what he was paid was deducted for the purpose of a motor vehicle (NP 300). The verbal agreement is alleged to have been made between the applicant Tendai Bonde and Mr Hafiz Naeem the Managing Director of Flynote Investments (Pvt) Ltd.

The dispute in question was then allocated to me by the Senior Labour Officer on 17 July 2023 and the Labour Officer on 19 July 2023 conducted an examination of the salaries and wages book for the period that the applicant worked for the second respondent at its premises in the presence of all interested parties namely Mr Tendai Bonde (Applicant) and Mr Moses Mashavae (Human Resources Manager) and Mr Ans Naeem (Finance Director) both representing the second respondent.

... The Labour Officer checked both the computer soft copies and the printed hard copies from the period July 2021 to February 2022.”

The Labour Officer's determination further reflects that the applicant's claim made before the inspection of the respondent's books that “Waqas Aslam Muhammad and other two (sic) expatriate staff are on a different salary schedule that the second respondent did not reveal”

was not supported by the information on the documents that he inspected. He also found no evidence of another salary schedule with better conditions or salaries for expatriate staff.

38. The judgment of the court *a quo* confirms, at p 5, that:

“The grounds of appeal relate to issues that were never before the Labour Officer. The salaries of expatriates were never an issue together with the issue of comparators. The court order clearly stated that he should inspect the salaries book to find out whether the appellant earned ZWL\$197 000, 00 and whether there was any deduction from it meant for the purchasing of a motor vehicle. The Labour Officer did as ordered. There is no misdirection in that regard.”

39. The question whether the issue of the comparison with expatriates’ salaries was an issue before the Labour Officer and thereafter the Labour Court is in my view, a factual issue. It is not a legal issue. The order of the court *a quo* stated that “the matter be and is hereby remitted to be dealt with by a different Labour Officer.” Being a remittal, the matter that was before Ms Kandengwa would be illuminative. In this regard the order of the court *a quo* dated 23 March 2023 referred to in para 18 above refers to the search and inspection of “a salaries register or wage book for the period within which first respondent was employed to put to rest the issue of outstanding amount being part of the salary allegedly deducted for the purpose of a motor vehicle.” (*sic*) In my view this resolves the question. The answer is that the issue that was before the Labour Officer Kandengwa concerned the alleged underpayment due to deductions from his salary for the purpose of purchasing a vehicle for the applicant.

40. The examination or inspection of documents was done in the applicant’s presence. Notably, the applicant now makes a sweeping statement about the issue as if it was not the issue central to his claim. The sweeping statement is made in circumstances where the issue

suddenly appears with no background given by the applicant about how it comes to be mentioned. This tends to lend credence to the respondent's version which is corroborated by the orders and judgment of the court *a quo* discussed earlier herein. The extent of the brevity of the applicant's narration of events was such as to create yawning gaps which were filled by the detail availed by the respondent, the Labour Officer and the court *a quo*. The issue regarding the salaries of expatriate staff was not before the Labour Officer, Kandengwa. It could therefore not be an issue before the Labour Court or before the Labour Officer Madziya. It follows therefore that it cannot be an issue to be brought on appeal to the Supreme Court.

41. The applicant could have availed the nascent documentation by which he initiated the involvement of the Labour Officer. He did not. The impression is therefore created that for unexplained but possibly deliberate reasons, he opted, in his strategy of furnishing severely abridged facts, to withhold the relevant documents relating to the claim that he had before the Labour officer. Further, that he did so in circumstances where this would have quickly and easily resolved the question, presumably in his favour if he is being candid with the court. He chose not to support his contention by way of attaching such obviously advantageous documentation and made such a choice while aware of the pronouncement by the judge *a quo*. His choice can only have adverse consequences against him. The disparity of salaries with expatriates or other employees was not an issue before the court *a quo* because it was never an issue before the Labour Officers.
42. It was the applicant's decision to attach the documents that he did and to leave out those that he did not. He has thus been lacking in candour with the court. The lack of candour also

manifested in the “adjusting” of a quote from the Labour Officer’s determination thereby potentially creating or portraying a different complexion to what was in fact stated by the said officer.

43. In addition to the above, as already stated, the issue is factual and does not raise any points of law. The applicant has departed from the complaint that the Labour Officer (s) was/were seized with at his instigation. He cannot tailor his case as he progresses along the different *fora*. A reading of the judgment of the court *a quo* shows that the applicant’s claim before the Labour Officer was for arrear salaries and benefits. Notably, the applicant does not dispute this. In para 21 above, I highlighted para 2 (i) of the relief sought by the applicant in the craved appeal – including an order that he be paid “a salary of \$ 197 000 RTGs at the prevailing interbank rate of 86:92 as at July 2021.” It seems to be not in sync with his complaint.
44. I therefore find that allowing this application would result in an “appeal” in which the court would in reality be turned into a court of first instance. The gatekeeping function that must be exercised in any such application does not permit for such. Without the documentation pertaining to the matter that was eventually remitted to the Labour Officer, the apparently factual issues raised by the intended grounds of appeal are not capable of assuming the nature of the required points of law. Relevant documents, if they exist, would enable the applicant to convince this Court that the court *a quo* may have erred when it found that issues raised by the applicant were not raised before the Labour Officer.
45. Be that as it may, in the final analysis the applicant’s intended appeal, from whichever angle it is viewed, raises questions of fact and not questions of law, as properly objected to by the

respondent. The respondent's contention that there is therefore no valid application before this court is thus well grounded. See para 8 above. The preliminary point is therefore upheld.

46. For the stated reasons, the application stands to be struck off the roll, Costs will follow the cause.

47. It is accordingly ordered as follows:

“The application be and is hereby struck off the roll with costs.”

Danziger & Partners, respondent's legal practitioners.